NO. 48913-9

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SOPHEAP CHITH, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Katherine M. Stolz

No. 13-1-00554-1

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Where the total sentence for two counts was entered in excess of the statutory maximum, should the sentences be reversed and should this case be remanded for resentencing?

2. Where due process was not offended by the defendant having been convicted of both parting out a stolen car and possession of a stolen car, and where the less serious crime was dismissed on double jeopardy grounds, should the dismissal be affirmed?

B. STATEMENT OF THE CASE.

On February 8, 2013, Appellant Sopheap Chith (the "defendant") was charged with seven offenses, four of which were felonies and three of which were gross misdemeanors. CP 45651, 3-6. The charges were later amended to add two additional felonies, (1) a violation of a protection order, and (2) first degree taking a motor vehicle without permission. CP 1-6. The case proceeded to trial and the defendant was convicted of all six felony offenses and all three gross misdemeanors. CP 57-70, pp. 1-2.

The defendant filed a direct appeal under this Court's case number 45651-6. The appeal was transferred to Division Three under case number 33002-8, and decided via an unpublished opinion entered on July 9, 2015. CP 45-55. One of the original crimes of conviction was reversed and the case was remanded for re-sentencing. *Id.*

While the appeal was pending, the defendant was convicted and sentenced for nine additional felony offenses under Pierce County Cause number 13-1-00499-4. CP 73-97. Thus, when the defendant appeared for re-sentencing on April 15, 2016, his offender score was calculated at nine plus for all of the felonies. CP 57-70, p.3. For the most serious offense, that is the drive-by shooting from count two, the total standard range was calculated at 87-116 months. *Id.* He was sentenced to 116 months on that count. *Id.*, pp. 5-6. The base sentences for all of the counts were run concurrent, but the defendant was also sentenced for three firearm sentence enhancements. *Id.*, p. 6. The total sentence was thus 206 months.

Several specific entries in the judgment bear mentioning separately. The state concedes that they are erroneous and should be corrected at re-sentencing. First, on page 2 the date of sentencing for the crimes from cause number 13-1-00499-4 is incorrectly listed as October 14, 2013, and should have been listed as June 6, 2014. CP 73-97, pp. 1-2. Second, on page 3, the maximum sentence for count eight, the protection order violation, is listed as ten years and $20 thousand dollars, but should have been listed as five years and $10 thousand dollars. CP 57-70, p 3. Several other entries in the judgment may also have been entered in error, but are substantive and will be discussed below.

The re-sentencing hearing was held on April 15, 2016. RP 1. The prosecution conceded that two of the felonies, the possession of a stolen

vehicle and the first degree taking a vehicle without permission, merged as a result of double jeopardy. RP 8. CP 57-70, p. 4. No objection was raised to the double jeopardy ruling. RP 12. A dismissal of the stolen vehicle charge was included in the judgment. CP 57-70, p. 4. The defendant timely filed a notice of appeal on May 9, 2016. CP 98.

C. ARGUMENT.

1. WHERE THE TOTAL SENTENCE FOR TWO COUNTS WAS IMPOSED IN EXCESS OF THE STATUTORY MAXIMUM, REVERSAL OF THE SENTENCE AND REMAND FOR RE-SENTENCING IS REQUIRED.

The statutory maximum makes it impermissible for a court to sentence an offender to an aggregate total sentence for any one crime above the standard range. RCW 9A.20.021. *See* RCW 9.94A.533(3)(g), and .701(9). In this case, the defendant's judgment sought to preclude the possibility of such a sentence being imposed by including the following notation: "Note: combined term of confinement and community custody for any particular offense cannot exceed the statutory maximum." CP 57-70, p. 7.

The notation is not sufficient to cure a sentence in excess of the statutory maximum. ***State v. Boyd***, 174 Wn.2d 470, 472–73, 275 P.3d 321 (2012). "[T]he trial court, not the Department of Corrections, was required to reduce [the defendant's] term of community custody to avoid a sentence in excess of the statutory maximum. The trial court here erred in

imposing a total term of confinement and community custody in excess of the statutory maximum, notwithstanding the ***Brooks*** notation." *Id.* *See* ***In re Brooks***, 166 Wn.2d 664, 675, 211 P.3d 1023 (2009) ("We hold that when a defendant is sentenced to a term of confinement and community custody that has the potential to exceed the statutory maximum for the crime, the appropriate remedy is to remand to the trial court to amend the sentence and explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum.").

Under ***Boyd*** the trial court must not impose a total sentence in excess of the statutory maximum even where it includes a ***Brooks*** notation. It follows that in this case, if the total sentence for any of the felony offenses exceeds the statutory maximum, the defendant is entitled to be re-sentenced. The state concedes that this occurred with respect to the sentences for counts eight and nine.

In count eight the defendant was convicted of violation of a protection order with a firearm enhancement. The base standard range was correctly listed as sixty months, but the addition of the eighteen month firearm sentence enhancement caused the defendant's total sentence to be over the five year statutory maximum. CP 57-70, p.3. *See* RCW 9A.20.021 and RCW 26.50.110(4). *See also* 2013 Washington State Adult Sentencing Guidelines Manual, § 7, p. 293. Accordingly, the

defendant's sentence as to count eight should be reversed and he should be entitled to be re-sentenced on count eight.

In count nine the defendant was likewise sentenced above the standard range. On that count the defendant's base standard range was correctly listed as 72 to 96 months, but the addition of the 36 month firearm sentence enhancement brought the total sentencing range to 108 to 132. CP 57-70, p.3. *See* 2013 Washington State Adult Sentencing Guidelines Manual, § 7, p. 440. When the trial court sentenced the defendant to the high end of the range, plus the firearm enhancement, the total sentence exceeded the statutory maximum. *See* RCW 9A.20.021 and RCW 9A.56.070(2). Accordingly, the defendant's sentence as to count nine should be reversed and he should be entitled to be re-sentenced on count nine.

The remainder of the defendant's felony sentences do not exceed the statutory maximums for the charged offenses. The defendant's arguments concerning counts one and two are not well-taken. The defendant indicates that for those counts the addition of the community custody terms would cause those counts to exceed the statutory maximum. Opening Brief, pp. 7-9. The state acknowledges that the potential was there, and that RCW 9.94A.701(9) requires that the standard range portion

of the sentence be reduced if the issue arises, but the trial court did not impose community custody on any of the counts. CP CP 57-70, p.6.

The trial court's written judgment does not support that community custody was ordered. CP 57-70, p.6. The box adjacent to the community custody paragraph is not checked indicating (whether intentionally or through oversight) that community custody was not ordered. *Id.* The verbatim record of the trial court's imposition of sentence is silent as to community custody. RP pp. 13-16. The prosecution recommended community custody but the court's verbal imposition of sentence does not include community custody. *Id.* Thus, on this record community custody was not ordered for any of the counts.

With that having been said, since this case should be remanded for re-sentencing, there would be no harm in the trial court also being permitted to consider community custody where imposition of community custody would not cause the sentence to exceed the statutory maximum. If the trial court does so, and if the sentences imposed for counts eight and nine are comparable to the sentences imposed already for those counts, the trial court could order four months community custody on count two without exceeding the statutory maximum. The sentences for all of the

other felony counts (assuming that the court imposes the same sentence) are at the statutory maximum and thus are not eligible for community custody.

2. DUE PROCESS WAS NOT OFFENDED BY THE DEFENDANT HAVING BEEN CONVICTED OF BOTH PARTING OUT A STOLEN CAR AND POSSESSION OF A STOLEN CAR, AND THUS THE DOUBLE JEOPARDY DISMISSAL SHOULD BE AFFIRMED.

The notion that the defendant's convictions of both possession of a stolen vehicle and first degree taking a vehicle violate due process might carry more weight if the crimes involved nothing more than possession and taking. They do not. The first degree taking statute addresses disassembly or "chopping" or parting out of stolen vehicles. RCW 9A.56.070(1)(a) – (e). The possession charge involved mere possession. RCW 9A.56.068(1).

The jury instructions put to rest any argument that mere possession is involved in both crimes. CP 103-156, Instructions 28 and 43. There is no "removal of parts . . . with the intent to sell the parts . . ." element in the possession charge. *Id.* Thus, there is no room to apply the maxim that one cannot be both a receiver and the stealer of stolen property.

Due process cases addressing consolidated charges of possession and theft of property are readily distinguishable. In the ***Hancock*** case, the defendant was charged with first degree theft and first degree possession

of stolen property for the same property. ***State v. Hancock***, 44 Wn. App. 297, 298, 721 P.2d 1006 (1986). It does not take much imagination to see why the ***Hancock*** court would state "that one cannot be both the principal thief and the receiver of stolen goods" and hold that one of the charges had to be dismissed for due process reasons. *Id.* at 301.

The remedy in ***Hancock*** was dismissal after the defendant was found guilty of both charges. *Id.* Subsequently, Division One held that a different remedy was preferable. ***State v. Melick***, 131 Wn. App. 835, 844, 129 P.3d 816 (2006). The defendant in ***Melick*** was convicted of what was formerly taking a motor vehicle (and is now second degree taking a motor vehicle) and possession of stolen property for the same car. *Id.* at 837. The court held that "the fact finder should be instructed that if it finds the defendant guilty of the taking, it should not consider the possession charges. . . Since this was not done here, we vacate the PSP charge." *Id.* at 844, citing ***United States v. Gaddis***, 424 U.S. 544, 547, 96 S. Ct. 1023, 47 L. Ed. 2d 222 (1976).

In a case much more analogous to this case, no due process violation was found by the same court that decided ***Melick*** because the crimes involved much more than mere possession. ***State v. Strohm***, 75 Wn. App. 301, 310–11, 879 P.2d 962 (1994). In ***Strohm,*** the defendant was convicted of possession of stolen property and trafficking in stolen

property. *Id.* Just as the first degree taking charge in this case criminalizes the "chopping" or parting out of stolen cars, the trafficking charge criminalized not just possession, but distribution of stolen property. RCW 9A.82.050(1) (One commits first degree trafficking when one "knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property. . . ."). Since the two crimes did not involve mere theft and possession, the general due process rule from ***Hancock*** and ***Melnick*** did "not apply; a person can be convicted of theft and of trafficking in the same property." *Id.* at 310-11.

The stolen vehicle charge and the first degree taking charge in this case are analytically indistinguishable from the charges in ***Strohm***. Accordingly, the trafficking charge was appropriately not dismissed for due process reasons. Instead, the parties determined and evidently agreed that the lesser charge should be dismissed for double jeopardy reasons. The state has not filed a cross appeal of that issue.

Under double jeopardy analysis a court may not impose "multiple punishments for the same offense imposed in the same proceeding." ***State v. Womac***, 160 Wn.2d 643, 651, 160 P.3d 40 (2007), quoting ***In re Pers. Restraint of Percer***, 150 Wn.2d 41, 48-49, 75 P.3d 488 (2003). While a particular criminal episode may be charged and submitted to a jury on

multiple charges, at sentencing the court must vacate any lesser counts that amount to multiple punishment for the same offense. *Id.* at 660. ***State v. Villanueva-Gonzalez***, 175 Wn. App. 1, 8, 304 P.3d 906 (2013), *aff'd*, 180 Wn.2d 975 (2014) ("When a conviction violates double jeopardy principles, we must reverse and remand a sentence that contains convictions for the same offense with instructions to vacate the lesser punished crime."), citing ***State v. Schwab***, 163 Wn.2d 664, 675, 185 P.3d 1151 (2008).

Consistent with the foregoing, the trial court dismissed the stolen vehicle charge because it was a less serious offense compared to the first degree taking a vehicle charge. CP 57-70, p.4. While the trial court's judgment used the terminology "dismisses [without] prejudice", rather than "vacates", the two outcomes are indistinguishable. Importantly, if the first degree taking charge were to be overturned, the possession charge could be reinstated without a double jeopardy violation under both iterations. ***State v. Schwab***, 163 Wn.2d 664, 676, 185 P.3d 1151, 1156 (2008) ("The reinstatement of [the defendant's] manslaughter conviction simply does not raise a double jeopardy concern.").

The defendant's due process arguments are not well taken. There was no due process violation when the defendant was convicted of parting out a stolen car as well as possession of a stolen car. There might have been a double jeopardy violation but that was addressed at sentencing

when the possessory charge was dismissed. The trial court's dismissal should be affirmed.

D. CONCLUSION.

For the foregoing reasons, the sentences imposed for counts eight and nine should be reversed, the dismissal of count three should be affirmed, and this case should be remanded for re-sentencing.

As to appellate costs, in light of the January 4, 2017, amendment to RAP 14.2, the state is unlikely to request costs in this case considering the defendant's indigent status and lengthy prison sentence.

DATED: Friday, March 17, 2017March 20, 2017.

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Certificate of Service:
The undersigned certifies that on this day she delivered by ~~US mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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